FEDERALLY SPEAKING

by Barry J. Lipson

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Welcome to **Federally Speaking,** an editorial column compiled for the members of the Western Pennsylvania Chapter of the Federal Bar Association and all FBA members. Its purpose is to keep you abreast of what is happening on the Federal scene, whether it be a landmark US Supreme Court decision, a new Federal regulation or enforcement action, a "heads ups" to Federal CLE opportunities, or other Federal legal occurrences of note. Its threefold objective is to educate, to provoke thought, and to entertain. This is the 32nd column. Prior columns are available on the website of the U.S. District Court for the Western District of Pennsylvania (http://www.pawd.uscourts.gov/Headings/federallyspeaking.htm).

LIBERTY'S CORNER

HAIL AND FARE THEE WELL: DAG LARRY D. THOMPSON. As previously noted [16], **Deputy Attorney General Larry D. Thompson**, the number two person in the **U.S. Department of Justice**, "is a good friend of the Federal Bar Association. … In speaking about Post 9-11 America he cautioned, 'we must not change the essential character of our country. If we do that the bad guys have won.' He continued, 'but we cannot be timid.' Our actions have been 'in sun light,' and are 'subject to judicial review.' He then confirmed that 'we may think outside of the box, but we are not going to think outside of the Constitution.'" Larry has resigned as **DAG** effective August 31, 2003. Hail and fare thee well!

Point AND COUNTERPOINT. In response to the **Executive Branch's** reactions to 9-11, those groups in our Society dedicated to preserving **civil rights**, **civil liberties** and the constitutionally mandated **"checks and balances"** between the **Executive, Legislative** and **Judicial** branches of government, vigorously point out, in the words of **U.S. Senator Arlen Specter** (R-PA), that "even in war, **Congress** and the **Courts** have critical roles in establishing the appropriate balance between **national security** and **civil rights**;" and that, as summed up by founding father **Benjamin Franklin**: "Those that can give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety." In evaluating the current state of the nation, **Dr. Mary Ruwart**, author of ***Healing Our World,*** pointed out that: "If the 9-11 terrorists wanted to destroy our freedoms, they've done a great job provoking a conservative president to enact measures that have effectively voided most of our remaining constitutional rights." As **Senator Specter** pointedly remarked, we "should not forget that decades after interning **United States citizens of Japanese extraction**, the government apologized and paid reparations." Indeed, late in July 2003, the **U.S. House of Representatives**, by an overwhelming 309 to 118 vote (with 113 Republicans voting in favor), added an amendment to the **Departments of Justice, State and Commerce** funding legislation that would bar **Federal law enforcement agencies** from implementing the **USA Patriot Act "sneak and peek" search warrant provisions,** which in effect allows **Federal agents** to search homes, confiscate certain property and "bug" computers without notice to the subject of the search. Now, unsuccessful **U.S. Supreme Court** nominee **Professor Robert H. Bork** is expressing his counterpoint, to wit, "that people who **recklessly** exaggerate the threat to our liberties in the fight against terrorism do give ammunition, moral and otherwise, to our enemies." In apparent support of this counterpoint,

Attorney General John Ashcroft has embarked on the "campaign trail" to tout the **USA Patriot Act** before law enforcement audiences (and reportedly without the opportunity for Q&A). The **American-Japanese World War II internees**, and **Rev. Martin Niemoeller** (who was initially a hero to and supporter of **Adolf Hitler** and later a concentration camp prisoner), may have serious problems with this counterpoint. As **Rev. Niemoeller** strongly cautions (in one of a variety of translations): "First they came for the communists, and I did not speak out -- because I was not a communist; Then they came for the socialists, and I did not speak out -- because I was not a socialist; Then they came for the trade unionists, and I did not speak out -- because I was not a trade unionist; Then they came for the Jews, and I did not speak out -- because I was not a Jew; ***Then they came for me -- ."*** Is it **"reckless"** to protest the circumventing of our basic liberties, the **Bill of Rights**, and/or the **checks and balances** provided by **Congress** and the **Judiciary;** or is the real **"recklessness"** attempting to circumvent these protections? You be the Judge!

WIT & WISDOM

FLYSPECKING. Previously we have observed that, while to some of our readers certain of **Federally Speaking's** news items "may appear to be incredible or incredulous," in reporting on the **Federal** legal scene, in the words of ***Will Rogers***, we "don't make jokes," we "just watch the government and report the facts." **[17]** If the antics reported upon do incur some levity, ***Victor Borge*** reminds us that perhaps we are engaging in the most effective form of communication as he advises: "Laughter is the shortest distance between two people." At least one member of the Federal Judiciary, ***U.S District Court Magistrate Judge Stephen L. Crocker***, would appear to agree, as shown in his recent erudite opinion in ***Hyperphrase v. Microsoft***, No. 02-C-647-C (WD Wisc, July 1, 2003), where he responded to a violation of his formal **Anti-Flyspecking Order.** It seems that that perennial "bad boy" Microsoft, in e-filing its **Summary Judgment** motion, failed to comply with the **Scheduling Order** and midnight "e-filing" deadline rule. "In a scandalous affront to the court's deadlines, Microsoft did not file its **Summary Judgment** motion until 12:04:27 a.m. on June 26, 2003, with some supporting documents trickling in as late as 1:11:15 a.m. … Microsoft's insouciance so flustered Hyperphrase that nine of its attorneys [all then individually named by Judge Crocker] … promptly filed a motion to strike the **Summary Judgment** motion as untimely. ***Counsel used bold italics to make their point,*** a clear sign of grievous iniquity by one's foe" [emphasis added]. The Court, however, distaining such '**flyspecking**," showed mercy: "Wounded though this court may be by Microsoft's four minute and twenty-seven second dereliction of duty, it will transcend the affront and forgive the tardiness. Indeed, to demonstrate the even-handedness of its magnanimity, the court will allow Hyperphrase on some future occasion in this case to e-file a motion four minutes and ***thirty*** seconds late, with supporting documents to follow up to ***seventy-two*** minutes later [emphasis ***not*** added]. Having spent more than that amount of time on Hyperphrase's motion, it is now time to move on to the other Gordian problems confronting this court. Plaintiff's motion to strike is denied." Judge Crocker, in addition to leaving Hyperphrase "crocked up" and "hyper" and "phraseless," has perhaps, indeed, shortened the communications gap for the remainder of these proceedings.

FED-POURRI™

GAUGING GAS GOUGING. Did you blink one day in late August and find, faster than seemed humanly possible, gas prices everywhere had jumped fifteen cents or more? Could independent reactions to market factors or even lawful **price leadership** (monkey see, monkey do, but without any direct contact or understandings between the chimps/chumps raising the prices) ***be that quick and that universal?*** If not, the **Sherman Antitrust Act** has been violated. Even if so, is this socially responsible conduct? It has been suggested that legislation be enacted depriving the oil and gas industry of any profits attributable to too quick and/or too high increases in the price of gas in response to negative market factors; and to too slow and/or too conservative reductions in gas prices in response to positive market

factors. A resounding 86% of gas consumers (that's just about all of us) responding to the non-scientific KQV-Pittsburgh radio poll voted for "legislation to outlaw price gouging at the gasoline pump." Such legislation is already in place in seven other states and is being sought by the Arizona Attorney General. What do you think? Is the oil and gas industry's ethical gas gauge pointing to empty? Is new **Federal legislation** and/or **Federal Antitrust criminal prosecutions** called for here? Should consumers "take gas," and if so in which way?

ASHCOFT ATTACKS SPCA IN WDPA. The Western District of Pennsylvania (WDPA) has yet another claim to fame. It has been chosen as U.S. Attorney General John Ashcroft's kick-off venue for the government's latest **War.** Not the **War On Saddam**, or the **War On Terrorism**, or the **War On Drugs**, or the **War On Child Pornography**, but the **War On Sexual Portrayals by Consenting Adults (SPCA).** His office in WDPA recently obtaining a 10-count indictment against Robert Zicari (a/k/a Rob Black) and Janet Romano (a/k/a Lizzie Borden), owners of the Extreme Associates website. It is reported that the **SPCA** battle plans were on the drawing board before 9-11, but that unfortunate and untimely tragedy, and intervening and intertwined **Wars Against Terrorism and Saddam**, delayed the first **SPCA** barrage being fired until now. But true to his original agenda, from his **SPCA War Command Post** high atop the **"Spirit of Justice"** and "her 'exposed right mammary'" in the **U.S. Justice Department** Rotunda [13], he appears to have now commanded, as Shakespeare's Mark Antony had: **"Cry havoc! And let slip the dogs of war"** on SPCA's throughout the land. Apparently, all of the other **Wars** are sufficiently "won" or under control, and there is sufficient **compelling Federal government interest** here, so that another battle front needed to be opened and scarce resources, that would not be better utilized fighting the already blazing other "good fights," needed to be allocated to its prosecution (previously the **Feds** had **"let sleeping dogs lie"** on this front for over a decade). Cleverly, the battle was not joined in LA where defendants abide; where presumably at least some of the male and female mail and Internet customers also resided; and from where the materials showing the consenting adults consentingly doing the allegedly illicit consensual acts were broadcast and/or distributed. The apparent test of legality being "**community standards**," did the AG fear LA's standards were not puritanical enough for him? And bye the bye, if the test is and does remain **community standards**, whose standards are to apply? The **SPCA's** were distributed from LA and received not only in WDPA, but also over the Internet, ***everywhere else in the world*** including LA, London and Lisbon. But presumably they were not intended to be seen or actually seen in public theaters anywhere. They were viewed in private on "Boob Tubes" (pun intended), or in the privacy of one's own abode. So is or should the "**community standards**" be those of LA, WDPA, NYC, the Internet generally (porn being the Internet's biggest business and a diving force behind the technological development of the Internet), the community of viewers who access the Extreme Associates website, each viewer's own home, or, per chance, the Earl of Ash's croft? Then too, questions of **constitutionally protected free speech**, and the ramifications of the recent **U.S. Supreme Court** decision overturning the **Child Pornography Prevention Act of 1996** (***Ashcroft v. The Free Speech Coalition***, 535 U. S. 234 (2002)), will have to be battled over. All in all, while we do not know if any dogs appeared in the **SPCA's** under attack, the **Feds** seems to be taking on dogs of cases. But, isn't it common wisdom that it is best to continue to **"let sleeping dogs lie?"**

STEWARD KOELTL EXTRACTS STEWART FROM STEW. In his role as steward of the **Constitution**, **U.S. District Court** Judge John G. Koeltl has extracted attorney Lynne Stewart from a stew of international intrigue and terrorism, at least partially. Attorney Stewart and her co-defendants were **Federally indicted** for allegedly providing **material support to a "foreign terrorist organization"** (FTO) in violation of 18 U.S.C. §2339B, by facilitating communications between that alleged FTO and her client Sheikh Omar Abdel Rahman, whom she had represented since his 1995 trial for conspiracy to commit terrorist attacks in New York City (***U.S. v. Sattar,*** No. CR. 02-395 (SDNY April. 4, 2002)). This "material support" was alleged to have consisted of providing "personnel" and "communications equipment" to the FTO. However, Judge Koeltl found that "the **Government** fails to explain how a

lawyer, acting as an agent of her client, an alleged leader of an FTO, could avoid being subject to the criminal prosecution as a 'quasi-employee' allegedly covered by the statute." Indeed, Koeltl advised, the "Government," itself, "expressed some uncertainty as to whether a lawyer for an FTO would be providing personnel to the FTO before the Government suggested that the answer may depend on whether the lawyer was 'house counsel' or an independent counsel -- distinctions not found in the statute…. The defendants are correct and by criminalizing the mere use of phones and other means of communication the statute provides neither notice nor standards for its application such that it is ***unconstitutionally vague as applied"*** (emphasis added). Stewart and her co-defendants were charged with communicating to the FTO the withdrawal of Rahman's support for the tentative cease-fire the FTO had with the Egyptian government after the FTO's 1997 execution of 62 individuals at a Luxor archeological site. Judge Koeltl, while also dismissing a conspiracy count based on the same statute, left standing the lesser charges of conspiring to defraud the government and making false statements, but did grant her request for an evidentiary hearing relating thereto. It is suspected that if and when she is fully extracted from this stew, she will get royally stewed.

A WARN ACT WARNING! Recently this column has become privy to a **non-precedential** decision regarding which the caption itself is not being disclosed. Fear not, this is not another **U.S. Foreign Intelligence Surveillance Court** proceeding, but the deliberations of a panel of three **U.S. District Court Arbitrators** sitting in an elegant wood paneled Ceremonial Federal Courtroom somewhere in America. This Courtroom was nearly overflowing with distressed terminated employees who had worked in an industry that has fallen out of favor. Their complaint was that without warning their **WARN ACT** rights had been violated (**The Worker Adjustment And Retraining Notification Act,** 29 U.S.C. 2101, et seq.), in that they were terminated without the required 60 days notice. They even alleged that the employer, who had over the total required number of employees (100), tried to reduce their office below critical mass (50) before initiating the mass terminations; and that not contesting the payment of **Unemployment Compensation** proved that no alternate employment had been offered. The employer countered that it was really a "good guy" for not contesting any **Unemployment Compensation** payments, for voluntarily giving severance pay to employees who had been employed seven months and over, and for offering reasonably located alternate employment to all. Indeed, it argued that its offer of employment exempt it from the 60 day notice requirement; and that notice was not required anyway since after subtracting the employees who accepted this employment offer and those who did not have 6 months of continuous service, "critical mass" was not achieved. After due deliberation the panel unanimously decided that the numbers test under the **WARN Act** was three pronged. First, there most be a total of 100 or more employees which was stipulated to here. Second, it must be determined if the to be terminated unit employees numbered at least 50 who met the 6 month of service in a year criteria. Here over 50 had received severance for at least 7 months continuous service. Third, if so, the number 50 had no further relevance, and all employees "aggrieved" or "effected" by the failure to give the 60 days notice, who had not received offers of alternate employment, no matter their length or continuity of service, would be entitled to statutory compensation. It was determined that while the location of the alternate employment was reasonable, defendant had not met its burden of proof to establish that the informal oral notice(s) allegedly given were effectively communicated to plaintiffs. But, as the evidence did not establish that the severance payments were other than voluntary, the **Award** was to be accordingly reduced. Why all the secrecy? Under the **U.S. District Court's Arbitration Rules,** the **Award** only becomes final after 30 days if neither party appeals. If appealed there is a **trial de novo** before the **Court**. But we did want to act to warn about the **WARN Act!**

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